

## Legal Responsibility: Psychopathy, a Case Study

### Introduction

Sentimentalists argue that the capacity to experience certain emotions is necessary for moral understanding. This view, if sound, has potentially important practical implications.<sup>i</sup> Firstly, if people who lack the relevant emotional capacities exist, then these people lack moral understanding. Secondly, if (as many moral philosophers and legal theorists believe) moral understanding is a necessary condition for moral and criminal responsibility, then people who lack the relevant emotional capacities are not morally or criminally responsible. Thirdly, to the extent that society subjects emotionally-incapacitated individuals, who are not morally or criminally responsible to harm, in the form of blame and punishment, then society is currently inflicting *unjustified harm* on these individuals, given that responsibility is widely considered a prerequisite for justifiable blame or punishment. Arguably, these considerations give rise to a morally pressing need to investigate whether there are people with the relevant emotional incapacities and whether reliable techniques can be developed for identifying them, to enable them to be exempted from blame and punishment. (Although, even if blaming and punishing emotionally-incapacitated individuals were unjustified, it could still be justified to detain/treat them to prevent them from harming others.) Philosophers and cognitive scientists have increasingly engaged in interdisciplinary research into these questions. A consensus seemed to be emerging (for an overview see Litton 2010) that psychopaths were plausible candidates for individuals lacking in the capacities that sentimentalists consider necessary for moral understanding and that the most promising technique for identifying psychopathy was the Psychopathy Checklist-Revised (PCL-R) (Hare 2003.). Many philosophers who have written about the topic, have endorsed the conclusion of Malatesti and McMillan's (2010) edited collection on psychopathy that "...based on a consideration of the empirical literature there are good reasons for not considering psychopaths morally responsible" (p319).<sup>ii</sup> However, increasingly, the empirical evidence regarding psychopaths' supposed incapacities has

yielded seemingly conflicting results that have been very hard to interpret. This empirical uncertainty raises the question of how society should treat individuals who *may* have responsibility-undermining emotional incapacities.

Some findings seem to indicate significant neurological and behavioural differences between psychopaths and non-psychopaths. However, other studies have failed to show significant abnormalities among the sample of psychopaths that were tested; most research indicates that psychopaths' deficits seem to be a matter of degree; and there is some evidence that (at least some of) psychopaths' abnormalities emerge only under certain, specific conditions (for overviews, see e.g. Blair 2017, Maibom 2017, Tillel et al 2019). Based on this equivocal evidence, a growing number of theorists have expressed varying amounts of scepticism about the claim that psychopaths are not morally responsible. For example, Jurjako and Malatesti (2018) have argued that psychopaths' deficits seem context-dependent and that psychopaths should only be relieved from responsibility, if at all, in "unusual" (p1020) cases where the situation in which the crime was committed resembled the conditions in those experiments where psychopaths' deficits were apparent. Maibom (2008, 2018) has argued that the evidence suggests that, at most, psychopaths' emotional capacities are *merely impaired* and so they cannot be excused based on a *lack* of these capacities. Fox et al (2013) claim their "analysis of the empirical evidence" suggests that psychopaths should be considered partially responsible (p1). Jalava and Griffiths (2017) conclude that "in the absence of consistent data and a coherent way of determining their meaning, it is premature to use the data to pronounce on psychopaths' responsibility...Inconsistent but suggestive data do not imply merely reduced responsibility, nor do they allow for tentative conclusions about responsibility" (p9).

This chapter will argue that moral and legal philosophers should respond to this empirical

uncertainty by paying more attention to the issue of who should bear the burden of proof, and to what standard, before an individual can be held responsible. In the context of criminal responsibility, in common law criminal justice systems, the general rule, based on the presumption of innocence, is that the State bears the burden to prove the accused's guilt beyond reasonable doubt.<sup>iii</sup> However, there is an exception to this rule, known as "the presumption of sanity", which, in some jurisdictions, places the burden of proof on the accused to prove certain mental incapacity defences (such as the "insanity" defence) on the balance of probabilities.<sup>iv</sup> In England and Wales, the Law Commission (2013) has proposed that the accused should only have to bring some evidence to raise the accused's mental incapacity as a live issue, and then, after presenting this evidence, it would be for the prosecution to prove beyond reasonable doubt that the accused, in fact, possessed the mental capacities required for criminal responsibility.<sup>v</sup> This chapter will provide some reasons for thinking that the Law Commission's proposal is in accordance with the moral rationale underlying the beyond reasonable doubt principle. Applying these conclusions about the burden and standard of proof to the problem of individuals with emotional incapacities, it will be argued that a) the current evidence is not strong enough to warrant excusing someone on the basis of a psychopathy diagnosis alone, but b) if there is a plausible interpretation of the evidence about the nature of psychopathy in general that is consistent with the sentimentalist's basis for denying that such individuals have the capacity for moral understanding, then this evidence *together* with an assessment of the particular individual's capacities (which must be determined on a case-by-case basis) could provide grounds for excusing particular individuals. Of course, sentimentalism is a contested theory and so there is theoretical uncertainty about this aspect of the case for excusing an individual with psychopathy (not just empirical uncertainty about the scientific evidence concerning the nature of psychopathy). However, I will suggest that the above-mentioned considerations relating to the burden and standard of proof should be applied to this theoretical uncertainty (as well as to empirical

uncertainty) and that any doubt about sentimentalism should be dealt with in favour of the accused.

The first section of what follows will outline the argument, based on sentimentalism, for excusing individuals with certain emotional incapacities from moral and criminal responsibility. The second section will briefly describe key features of psychopathy as diagnosed by the PCL-R. The third section will discuss the appropriate burden and standard of proof when determining the criminal responsibility of psychopaths. The fourth section will summarise relevant research on psychopathy and will discuss an interpretation of this research that is consistent with psychopaths being entitled to an excuse on sentimentalist grounds. Finally, the fifth section will discuss the need for individualised evidence and will argue that it should be decided on a case-by-case basis whether someone diagnosed with psychopathy should be excused from criminal responsibility.

### **Section 1: Emotional Capacities, Moral Understanding and Responsibility**

Moral sentimentalists take different views about the precise role of emotions in moral understanding and about which emotions might be required, and about the nature of emotion (for overviews of these issues see: Kauppinen 2014). One of the earliest proponents of sentimentalism was the 18<sup>th</sup>-century philosopher, David Hume, who argued that feelings of approval or disapproval were a necessary part of making moral judgements (Hume, Selby-Bigge ed. 1975). Hume thought that these feelings stemmed from sympathy, which involved sharing another person's feelings. Many contemporary theorists who subscribe to the idea that psychopaths lack moral understanding have based their arguments on the idea that psychopaths lack the capacity for "empathy", which resembles Hume's conception of sympathy (Deigh 1995; Fine and Kennett 2004; Levy 2007; Morse 2008; Haji 2009; Glenn et al 2011; Focquaert et al 2014). There are different conceptions of empathy (for a taxonomy see Maibom 2017<sup>b</sup>). For the purposes of this chapter, the following account of empathy will be outlined which seems broadly to capture what many theorists seem to have in mind. Empathy involves the ability to feel an appropriate emotion in response to someone else's emotion or predicament (e.g. compassion at someone's

distress).<sup>vi</sup> It implies that one can experience a feeling of *caring*<sup>vii</sup> to some extent about the other person and that one can feel some aversion to the idea of other people being harmed. The connection between empathy and moral understanding, on this view, is that one cannot “get the point” of moral norms prohibiting harm to others, if is incapable of experiencing a feeling of caring about other people. On this view, merely understanding, purely intellectually, that there is a rule against seriously harming people, or that others label such actions “wrong”, is not enough for genuine moral understanding (or at least it is not enough for genuine understanding of harm-based moral norms). The ability to list such rules while being cut off from their emotional content, might be compared to a parrot’s ability to repeat words without grasping their meaning. Theorists who take this view often argue that understanding the moral wrongfulness of harming others requires emotional capacities that are not required for understanding non-moral norms, e.g. social conventions like dress codes (see section 4.1 below). They argue that one does not really understand what is wrong with, for example, a person stepping on someone’s face for sadistic pleasure, if one has never been capable of feeling any more aversion to the thought of harming others than one would feel about breaching a rule not to step on the grass.

It might be objected that people often judge actions that harm a person to be morally wrong without feeling empathy at *that* time or ever feeling empathy for *that person*. For example, one might be able to understand the wrongfulness of harms done centuries ago, or the wrongfulness of harming an adversary without feeling empathy for those victims.<sup>viii</sup> In reply, it might be suggested that moral understanding requires the capacity to empathise with someone, at some point, in order to learn the meaning of moral concepts, even if one does not need to empathise every time one later encounters or applies those moral concepts. By analogy, arguably in order to fully understand what is meant by the word “blue”, a person would have had to see the colour blue at some point, but after learning this concept, she can then understand what her friend is talking about when he phones her up and says he has painted his room blue, even though she has not seen her friend’s room.

Another objection might be based on an alternative conception of moral understanding based on rationalism, according to which, unlike sentimentalism, moral understanding does not require empathy,

but is an intellectual matter analogous to mathematical reasoning (Gill 2007). The rationalist might argue, for example, that if one thinks one's own pain is bad, one is rationally committed to believing, to be consistent, that it is wrong to inflict pain on others (A similar objection is discussed in Deigh 1995). In reply, firstly, it is not clear how the rationalist can, without begging the question, explain the leap from thinking one's own pain is "bad", in the sense of disliking it, to thinking that causing others' pain is "wrong", in the sense of morally wrong. Secondly, inconsistency is not necessarily always irrational. Putting milk in one's tea on Monday and then, for no particular reason, drinking one's tea without milk on Tuesday is, in a sense, inconsistent without being irrational (Deigh 1995). Thirdly, even if it were demonstrated that immorality involved an irrational kind of inconsistency, it is not clear that understanding that hurting others is "irrational because inconsistent" is the same as understanding that it is "morally wrong". Imagine that someone said, "I firmly believe that harming others is morally wrong, and so I never harm others, although I have always felt neutral/pleased/amused at other people's distress in itself. It's the *inconsistency* that bothers me." The sentimentalist would doubt the speaker had genuine moral understanding of what was wrong about harming others.

There is not scope in this chapter to engage further in the debate between sentimentalists and rationalists about the nature of moral understanding. I will suggest in the next section that the arguments in favour of sentimentalism may be enough to raise a reasonable doubt about whether individuals who are incapable of empathy can understand moral norms and that this might be enough to justify excusing them.

At this point, it is necessary briefly to spell out the connection between moral understanding, moral responsibility and criminal responsibility. Most philosophers accept that in order to be held morally responsible for failing to act in accordance with moral reasons, one must be capable of guiding one's actions in accordance with moral reasons, which requires (among other conditions) that one understands such reasons (for an influential account of moral responsibility see Fischer and Ravizza 1998). Many theorists of criminal law and punishment, in turn, accept that moral responsibility should be a precondition for criminal responsibility. For example, according to retributivism (which may be the

dominant view among penal theorists – Matravers 2016) punishment is only justified if the offender deserves it, in virtue of being morally responsible for a wrongful act. Communication theorists (e.g. Duff 2001) explain the connection between moral understanding and criminal responsibility partly by reference to punishment's aims of communicating a message of moral disapproval of criminal wrongdoing and attempting to persuade offenders to reform. These aims depend on the offender being able to understand this moral message and to understand the moral reasons for reforming. The literature on the criminal responsibility of psychopaths has been particularly influenced by the communication theory of punishment (see, e.g., Duff 1977, Fine and Kennett 2004, Morse 2008, Shaw 2009).

Theorists who maintain that psychopaths should be excused from criminal responsibility typically focus on psychopaths' eligibility for the insanity defence, which in many common law criminal justice systems is based on the McNaghten rules, which state that to qualify for the defence, the accused must have, at the time of the crime, suffered from "a disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong".<sup>ix</sup> However, knowledge of wrongfulness has been interpreted by the courts in some jurisdictions, such as England and Wales, as knowledge of *legal* rather than *moral* wrongfulness. However, the Law Commission (2013) have proposed to replace the insanity defence with a broader defence, which would allow the jury to consider whether the accused had the capacity to understand the moral wrongfulness of his conduct. This chapter will be based on the assumption, shared by many legal theorists, that the insanity defence (or an equivalent defence) ought to include an incapacity for moral understanding.

It should also be noted that arguments for excusing psychopaths from responsibility have been developed that are more consistent with other metaethical theories, such as rationalism (e.g. Nelkin 2016). There is not scope within this chapter to provide an account of these other arguments. However, this chapter exemplifies a methodology that could be adopted by proponents of these other arguments: i.e. 1) present the metaethical and normative arguments for a particular set of criteria for responsibility,

2) present the empirical evidence that psychopaths do not meet these criteria, and 3) consider whether these arguments and this evidence has met the required standard of credibility. As will be explained in the next section, the cumulative weight of different kinds of arguments for excusing psychopaths (including arguments not explored in this chapter) could strengthen the overall case for excusing psychopaths, even if there is some uncertainty about the soundness of each argument individually.

## **Section 2: PCL-R Psychopathy**

Some descriptions of the PCL-R psychopath seem to suggest that psychopaths lack moral understanding on a sentimentalist view. On these descriptions, psychopaths seem emotionally cut off from other people and do not seem to have ever genuinely cared about anyone (Hare 1999<sup>x</sup>). Most people, including most convicted offenders, care about some people, such as their immediate relatives, friends or partner. Yet psychopaths apparently show no compunction about hurting, abandoning or using anyone who might try to form an intimate relationship with them. Even the concept of “honour among thieves” seems alien to the psychopath. While, for instance, criminal gang-members typically show some loyalty to other members, psychopaths will betray their associates whenever it suits them. On this account of psychopathy, this lack of an emotional bond with others is not simply the result of psychopaths becoming “hardened” through a criminal lifestyle but stems from a personality disorder that prevented them caring about others even in early childhood. While normally developing two-year olds typically show some aversion to signs of another’s distress and will typically stop performing an action when they perceive it is hurting someone and are responsive to parents’ disapproval of such behaviour; toddlers with psychopathic traits seem unfazed by others’ distress or parents’ disapproval (Kahn 2012). There are descriptions of very young children with psychopathic traits showing chilling detachment toward others’ suffering. One child with psychopathic traits calmly watched a sibling in a pool unable to swim, and failed to get help, saying he was “curious” about what drowning would look like; another gradually cut off a cat’s tail, in a series of small amputations, just to see what would happen (Kahn 2012).

However, not all individuals diagnosed as psychopaths using the PCL-R criteria will fit this description

of the “archetypal” psychopath (even though this kind of description is often provided by researchers who assume that the PCL-R is the best tool for diagnosing psychopathy that we currently have). An incapacity to feel empathy and an incapacity to form enduring relationships are just two factors out of twenty. Someone could meet the cut off score for psychopathy, even if they scored 0 on these factors, meaning that their empathy and ability to form relationships was intact (Maibom 2018). Failure, in certain studies, to exclude certain PCL-R “psychopaths” with intact empathic abilities may explain some of the inconsistent data discussed in section 4, below. (For a discussion of ways of improving the exclusion criteria when conducting such studies see Rosenberg Larsen 2018)

### **Section 3: Psychopathy and Empirical Uncertainty**

Jalava and Griffiths (2017) claim that most philosophers who discuss psychopathy take the empirical literature about psychopaths' supposed deficits at face value, without questioning the reliability and validity of the data. They caution against this approach, arguing that before theorists can say anything useful about the moral and legal responsibility of psychopaths, they must first engage critically and in detail with the science. It is futile, according to Jalava and Griffiths, to embark on philosophical and legal arguments, no matter how sophisticated, before the existence of psychopaths' deficits has been scientifically established. They draw the following analogy: no matter how legally astute they may be, there would be no point in defence and prosecution lawyers debating the legal implications of knife wounds on a corpse, before the coroner had established that the wounds existed in the first place.

This raises fundamental questions about how interdisciplinary research should be conducted in this area, given that most philosophers and lawyers are not scientifically trained and must rely heavily on the conclusions of scientific experts about the state of the evidence. Must philosophical and legal theorists wait until a consensus among these scientific experts emerges, before they can comment on the legal and philosophical implications? Given that

judges and juries cannot just throw up their hands and wait until science progresses, there has to be some kind of default position in the meantime. What that default position should be is an important ethical and legal question. A second key question concerns the level of certainty that should be required about psychopaths' deficits before moral and legal consequences should follow. The required level of certainty might well differ, depending on the nature of these consequences, e.g. moral versus legal responsibility, full exemption from responsibility versus diminished responsibility, mitigation of sentence versus preventative incapacitation. Thirdly, theorists can also usefully respond to a division of opinion between scientists about how to interpret the evidence, by mapping out the legal and philosophical implications of different possible scenarios, i.e., if interpretation a) is correct then certain legal and philosophical implications would follow, and if interpretation b) is correct then other implications would follow. This third point could generate proposals about a practical way forward, if it were combined with conclusions about the first two questions concerning the required levels of certainty for different legal/moral consequences and the conclusions about what the "default" position should be.

This chapter will focus on the required standard of credibility for holding psychopaths *criminally* responsible, given that holding people criminally responsible can warrant inflicting serious harm on them and is therefore of considerable practical importance. Arguably, the standard for holding psychopaths *morally* (but not criminally) responsible might be lower, given the less serious practical consequences of doing so.<sup>xi</sup> Given that moral responsibility is a precondition for criminal responsibility on many influential theories of criminal law and punishment (for overviews see: Duff and Hoskins 2017), it is worth spelling out the implications of endorsing both a) the principle that moral responsibility is required for criminal responsibility and b) the idea of having a lower standard of credibility for moral versus criminal responsibility. This would imply that, while doubts about the justification for

holding psychopaths morally responsible might not preclude holding psychopaths morally responsible (without imposing criminal responsibility), these same doubts about psychopaths' moral responsibility might preclude holding them criminally responsible.

In general, the default principle, in the context of criminal responsibility, is the presumption of innocence. The principle that the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt is regarded as fundamental in Anglo-American legal systems. It has been vividly described as the "golden thread" running throughout the "web" of English criminal law.<sup>xiii</sup> The "beyond reasonable doubt" principle is also, with few exceptions, widely endorsed by legal theorists, although there is still debate about the best justification for the principle and how a "reasonable doubt" should be interpreted (see, e.g., Picinali 2018, Reiman and Van Den Haag 1990). The more general idea that that the accused's guilt must be established to a high degree of certainty is recognised across wide range of jurisdictions, despite variations in how the principle is formulated (Clermont 2002).

This chapter will suggest that one way of dealing with the conflicting and puzzling evidence about psychopaths' impairments is to apply the beyond reasonable doubt standard, so that if the arguments and evidence are strong enough to raise a reasonable doubt about whether they lack the capacity for moral understanding, then psychopaths should not be held criminally responsible. Given the complexity of the issues, it is beyond the scope of this paper to provide a full justification for applying the beyond reasonable doubt standard in this context. Instead it will consider two of the main objections that might be raised against this approach and provide some reasons for thinking that these objections can be overcome.

The first objection is that "reasonable doubts" concerning the accused's mental capacities should be treated differently from doubts about other parts of the prosecution's case. Rather than requiring the prosecution to prove the accused's sanity beyond reasonable doubt, legal systems typically start with the default position that the accused is presumed to be of sound mind. A burden of proof is placed on the accused to rebut this presumption. This rule is

sometimes called “the presumption of sanity”. The rationale behind this presumption is disputed. It seems to be influenced, at least partly, by practical considerations. Ferguson (2018) calls it an “empirically-based” presumption, resting on the “common-sense” idea that most people, most of the time have the mental capacities required to be held responsible. If it were very rare for accused persons to suffer from responsibility-undermining mental disorders, then compelling the prosecution to bring evidence to rule out this remote possibility in every case would waste the court’s time. However, serious mental disorders are much more common among those accused of crimes than the general population, and although mentally disordered offenders rarely qualify for a mental incapacity defence, this is arguably because such defences are unjustifiably restrictive (Kelly 2018). Other practical considerations include the difficulties the prosecution might face in getting evidence that the accused had the required mental capacities. However, the Law Commission (2013) have persuasively argued that these practical considerations cannot justify placing an onerous burden on the accused to establish that they lacked the capacities required for responsibility. They point to the fact that these practical considerations apply equally to defences such as automatism, yet it has proved quite workable to require the prosecution to bear the burden of disproving those defences (once the accused has discharged the very light burden of just presenting enough evidence to raise the defence as a live issue). A more theoretical argument for the “presumption of sanity” is that it shows respect for the accused’s autonomy to prove his “insanity” before making him eligible for hospitalisation, which would amount to a serious “indignity” if he were sane (Brudner 1998, 308. Related theoretical arguments are considered and dismissed in Fine and Kennett 2004). However, it not clear that hospitalising a sane person is worse than imprisoning a mentally disordered person. If the accused has raised a mental incapacity defence (which is usually the case – Law Commission 2013, p180), this suggests that the accused has decided imprisonment is the worse option, and it not clear why the state should try to “protect” them from the consequences of that decision, based on the

state's view of which option is worse. Furthermore, decisions about whether hospitalisation and treatment are required can be made separately from the determination of criminal responsibility, based on different criteria (Law Commission 2013).

The second objection focuses on my suggestion that the beyond reasonable doubt standard should apply to the philosophical positions (e.g. sentimentalism) that are part of the overall case for excusing the psychopath, not just to the empirical evidence. Various writers have argued that the beyond reasonable doubt standard should apply to theoretical claims, not just empirical ones (see e.g. Pereboom 2006, Vilhauer 2009, Shaw 2014, Caruso 2018). One plausible defence of this approach is that the beyond reasonable doubt standard rests on a more fundamental principle about which there is widespread agreement among theorists from a range of different perspectives. Vilhauer (2009, 2012) has argued that this fundamental principle is the idea that there is a powerful presumption against inflicting serious harm on others, and that this presumption can only be displaced if there is a high degree of certainty that doing so is justified. It would be arbitrary, on this view, just to require a high degree of certainty about empirical considerations and not theoretical ones. Vilhauer argues that if there is a philosophically valuable debate about an issue then there must be a reasonable doubt about that issue. This seems plausible. If reasonable people, with relevant expertise, who have thought seriously about a question still disagree about how to answer it, it seems natural to say that there must be a reasonable doubt about the answer. There is a philosophically valuable debate about whether rational faculties alone are sufficient for moral understanding, or whether empathy is also required.

Different positions might be taken about *how much certainty* should be required that psychopaths lack moral understanding before they should be excused. I have suggested that raising a reasonable doubt as to psychopaths' capacity for moral understanding should be enough, but it might be argued that the threshold should be somewhat higher. Similarly, different positions might be taken as to how to interpret "reasonable doubt". The fact that

reasonable experts in the area who have seriously considered the matter have endorsed a particular argument for excusing psychopaths might be thought enough to raise a reasonable doubt. However, even if it were thought that one line of argument endorsed by one group of experts had not met the required threshold of certainty on its own, if we consider several lines of argument for excusing psychopaths (e.g. arguments based on empathic deficits, arguments based on evaluative deficits, arguments based on control deficits etc.) and each argument raised some doubt whether psychopaths were responsible, the cumulative weight of these doubts could meet the threshold for excusing them.

#### **Section 4: Evidence of Lack of Moral Understanding**

This section will summarise some of the key empirical findings concerning psychopaths' moral understanding and emotional capacities. Firstly, it will briefly discuss one type of study that attempts to measure psychopaths' moral understanding directly, by investigating psychopaths' ability to appreciate certain features of moral norms supposedly captured by the "moral/conventional" distinction. It will then discuss a second type of study that may indirectly shed light on psychopaths' moral understanding, by investigating emotional capacities that arguably underlie or enable the acquisition of moral understanding. These studies have generated complex and seemingly conflicting results. However, after describing each type of study, an interpretation of the evidence will be suggested that more-or-less reconciles these results and that is broadly consistent with the hypothesis that (at least some) psychopaths lack moral understanding. (The results of some studies may not fit with this interpretation due to their use of an over-inclusive definition of psychopathy, which may fail to exclude certain individuals with relatively intact empathy, as noted in section 2 above.)

##### *4.1: The Moral/Conventional Distinction*

One type of moral reasoning task relies on the moral/conventional distinction.

Although, this paradigm has been criticised (e.g. Kelly 2007, Shoemaker 2011), many theorists and cognitive scientists accept that it can shed some light on psychopaths' moral understanding (e.g. Blair 1995, Fine and Kennett 2004, Levy 2007, 2014). According to this paradigm, violations of moral norms, e.g. norms prohibiting assault, tend to have the following characteristics: 1) they tend to be more serious than transgressing conventional norms, 2) they are wrong at least partly because of harm to the victim 3) they are wrong independent of whether there is any rule against them, and 4) they would be wrong even if an authority-figure permitted them. In contrast, breaches of conventional norms (e.g. norms about the clothes to be worn as part of a school uniform) tend to be less serious than moral transgressions, tend not to be harm-based, and tend to be rule-dependent and authority-dependent.

Blair et al, who pioneered research on psychopaths' understanding of the moral/conventional distinction, concluded that psychopaths give abnormal responses to questions about it, suggesting that they may not genuinely understand the distinction (Blair et al 2001, 1995, Blair 1997). However, overall the results of studies in this area have been mixed. Psychopaths draw some distinction between moral and conventional transgressions based on the seriousness characteristic, but to a lesser extent than non-psychopaths (Blair 1995, 1997). When psychopaths are asked to come up with a reason on their own why moral transgressions are wrong, they are much less likely to invoke harm-based considerations (Arsenio and Fleiss 1996, Blair 1997). However, if psychopaths are explicitly asked whether an example of an immoral act causes harm, they tend to answer correctly (Aharoni et al 2012, 2014). When asked whether the action would still be wrong if there were no rule against it, psychopaths are less likely than controls to distinguish between moral and conventional transgressions on this basis (Blair 1995, 1997). However, when psychopaths are

presented with eight transgressions and are explicitly told that half are "moral" and half "conventional", psychopaths can group the transgressions into each category as accurately as non-psychopaths (Aharoni et al 2012, 2014).

#### *4.2: The Moral/Conventional Distinction: Interpreting the Evidence*

It is now relatively often suggested that Aharoni et al's findings (2012, 2014) discredit Blair's claim that psychopaths cannot draw the moral/conventional distinction (see e.g., Barnes 2018, Jurjako and Malatesti 2018, p1013, Jalava and Griffiths 2017, p 5, and Schlaich Borg and Sinnott-Armstrong 2013, p124). However, there are interpretations of the findings which are consistent with Blair's claim that psychopaths lack genuine understanding of the features of moral norms that the moral/convention distinction aims to capture. Levy (2014) points out that a) Aharoni et al asked psychopaths how *others* would categorise the transgressions, which may invite psychopathic participants to "parrot" the expected answers, even if the psychopaths themselves do not endorse or grasp the nature of moral norms and b) Aharoni et al told participants that half of the short list of transgressions were moral and half conventional, which gives them a substantial clue as to what the "right" answer would look like, making it easier to complete the task, even if the psychopathic participants lacked genuine understanding. In contrast, Blair's design asked participants for their *own* views, and did not give them this clue.

Apart from these empirical debates about how to interpret psychopaths' responses to the moral/conventional test, there are theoretical concerns about whether the moral/conventional distinction accurately captures the nature of moral norms (e.g. Shoemaker 2011, Kelly 2007). Such concerns are sometimes cited as grounds to doubt any argument for excusing psychopaths that relies on psychopaths' supposed inability to draw this distinction (e.g. Godman and Jefferson 2017). However, while these concerns suggest that the theoretical underpinnings of the moral/conventional test need to be refined, they do not necessarily undermine the *specific examples* used by the test to probe psychopaths' moral understanding.

For example, while proponents of the distinction may be mistaken in assuming that moral norms are completely authority-independent, since the “*victim*” may have the relevant authority (Shoemaker 2011), this point does not undermine the specific example used in the test that merely assumes, rightly, that the norm prohibiting one child from hitting another child does not depend on whether the teacher gave permission to do this. Similarly, while it may be wrong to assume, in general, that all moral norms are based on welfare, it is plausible that the wrongfulness of the specific moral transgressions that feature in the test depend, at least partly, on considerations concerning the victim’s welfare.

There seems to be a plausible interpretation of the moral/conventional distinction studies that suggests that psychopaths may fail to grasp important features of moral norms. It seems particularly telling that they often fail to come up with welfare-based justifications when asked why transgressions involving harm to others are wrong. When asked why hitting or kicking a child to make her cry is wrong, some psychopaths gave answers such as “it’s not socially acceptable” (Blair 1995, 212) – the same sort of reason they give for why conventional transgressions are wrong. This is just what would be predicted by the hypothesis that (at least some) psychopaths have an inability to empathise that prevents them from grasping what is morally wrong with hurting others and leads them to see moral norms as a set of arbitrary prohibitions equivalent to mere conventions. This is not undercut by the finding that psychopaths can respond correctly when explicitly asked whether an act harms the victim, as this latter question does not probe whether psychopaths *themselves* consider the victim’s welfare *relevant* to moral wrongfulness.

#### 4.3: *Emotional Capacities*

A wide range of studies have been conducted on emotional capacities that arguably underlie or enable the acquisition of moral understanding. These emotional capacities include: firstly, “affective theory of mind” – the ability to infer from the context what another is feeling; secondly, the ability to recognise another’s emotions, such as distress

and fear, from cues such as facial expression and tone of voice; and thirdly, the ability to feel an automatic, aversive emotional *response* to the recognition that another is afraid or distressed. Recognising what others' feel is necessary in order to understand how one morally ought to treat them. Evidence that psychopaths could not recognise others' feelings through the means investigated by the studies would not conclusively prove that they have impaired understanding, as they might work out what others feel through different means. However, (as will be explained in more detail in 5.2.3 below) evidence of impaired emotion recognition taken together with evidence of impaired emotional responsiveness make more plausible the idea that psychopaths are somehow cut off from others' emotions and thereby fail to develop a genuine understanding of norms about how others should be treated.

Studies on affective theory of mind typically ask participants to work out what various characters in a scene or vignette are feeling, based on information about the context. For example, normal participants may be expected to infer that character A desires object X, and that character B desires the same object, and that A will feel disappointed if B, rather than A, obtains the object. Psychopaths seem to perform the same as controls when the scenarios are relatively straightforward, e.g. based on a simple cartoon image (Sebastian 2012, Shamay-Tsoory 2010). However, psychopaths seem to perform less well when the scenarios and questions are more complex, e.g. when asked to record the different feelings characters experience during the course of a fifteen-minute video and when asked about the relationship between two or more characters' feelings, rather than just being asked about one character (Sharp and Vanwoerden 2014). Furthermore, although psychopaths' responses to the simple scenarios are similar to non-psychopaths, they seem to employ different brain regions when making these decisions. In addition, another type of study suggests that psychopaths do not register other people's perspectives in the

automatic way that non-psychopaths do. When non-psychopathic participants were asked to count dots on a screen, they were slower at doing so if they could also see a character on the screen from whose viewpoint a different number of dots were visible (Drayton et al 2018). It seems that non-psychopaths automatically register the character's perspective, which interferes with their response about what they can see from their own perspective, causing a delayed reaction. However, this time delay was not observed in psychopaths, suggesting that they did not automatically detect the character's perspective.

Some studies on psychopaths' ability to recognise others' emotions based on their facial expression or voice have suggested that psychopaths are less able to identify negative emotions such as sadness and fear, compared to non-psychopaths (Jusyte et al 2014, Blair et al 2005). However, when psychopaths' attention is directed in certain ways, they seem to perform normally. For example, in one study in which psychopaths were less accurate than controls at identifying facial emotions, it was observed that psychopaths were looking at the mouth region of the face, which carries less emotional information than the eye area. When psychopaths were explicitly asked to look at the eye area, their performance was normal (Dadds et al 2006). However, when the images flashed up so quickly that the participant's direction of gaze could not make a difference, their ability to recognise facial emotions seemed impaired compared with non-psychopathic controls (Jusyte et al 2014). There is also some evidence that psychopaths struggle to distinguish real from feigned distress (Dawell 2019).

Certain physiological reactions (e.g. increased skin conductance and fear-potentiated startle) that are associated with aversive states are normally seen in non-psychopaths when viewing images of others in distress, suggesting that they find others' distress

aversive. However, most studies on this topic suggest that these physiological responses to distress are deficient in psychopaths (see references in Maibom 2017<sup>a</sup>, p 1119). Furthermore, in some studies, regions of the brain, such as the amygdala, associated with processing emotional stimuli in non-psychopaths, did not activate normally when psychopaths were asked to evaluate facial expressions. This difference in amygdala activation between psychopaths and non-psychopaths appeared even when the emotional images flashed up so quickly that direction of gaze could not make a difference (Viding et al 2012). Some studies have also shown adult psychopaths and children with psychopathic traits have significantly lower amygdala volume than non-psychopaths (Blair 2005). Blair (2019) summarises the evidence as follows: “In summary, the existing literature relatively reliably indicates reduced responsiveness to facial expressions, particularly distress cues, in children and adults with conduct problems that may be particularly marked in those with psychopathic traits. The regions implicated across studies are not always consistent... but the basic finding of reduced neural responsiveness appears robust.”

#### *4.4: Emotional Capacities: Interpreting the Evidence*

One plausible interpretation that reconciles the mixed evidence on emotional capacities is that, while most non-psychopaths can *automatically* infer from the context what others are feeling, recognise others’ distress and find others’ distress aversive, (at least some) psychopaths’ *automatic* ability to do these things is significantly deficient (Tillem et al 2019). In specific circumstances, it seems that (at least some psychopaths) can exercise these capacities (non-automatically), provided their attention is suitably directed by the experimenter, although, it remains possible that individuals with severe psychopathy still have abnormal neurological responses, even in these circumstances. Blair (2019) points out that group-level results may mask the deficits of individual members of the group. An experiment failing to reveal deficient responses to emotional stimuli, under certain conditions,

in the psychopathic group overall (whose members had varied degrees of psychopathy) is still compatible with the hypothesis that a subset of individuals with *high* psychopathic traits still had reduced responses under these conditions. Blair (2019, p295) hypothesises that "...if the intensity of this stimulus is sufficiently heightened, via an attentional manipulation that increases the emotional stimulus' representational strength, group differences are reduced (because the individuals with lower psychopathic traits reach an asymptote level in responding)." Furthermore, it seems plausible that deficits in *automatic* emotion-processing leads, firstly, to an impaired ability to infer others' emotions from the context when the situation is relatively complex and, secondly, to an impaired ability to recognise emotions, such as another's distress, when there is no opportunity to take the time to focus on certain cues. The hypothesis that psychopaths have reduced emotional responses to others' distress is supported by the evidence that psychopaths show volume reduction in the amygdala (a brain area associated with these responses).

The next question is whether this interpretation of the evidence is consistent with arguments that (at least some) psychopaths have grounds for an excuse based on the idea that their emotional incapacities deprive them of genuine moral understanding. Based on research, such as that discussed above, showing that psychopaths sometimes have normal behavioural and neurological responses when performing tasks that purport to test morally relevant capacities, Jurjako and Malatesti (2018) claim that "psychopaths seem to have a general capacity to appreciate moral considerations" (p1016).<sup>xiii</sup> If psychopaths perform normally at least some of the time this, according to Jurjako and Malatesti, indicates that they have the general capacities required for moral responsibility. Nevertheless, since psychopaths appear to show deficits in certain contexts, Jurjako and Malatesti maintain that it is still an open question whether individual psychopathic wrongdoers had the specific capacities required for responsibility at the time of their

wrongful acts. They suggest, however, that occasions when psychopaths lack these specific capacities are likely to be rare, for the following reasons. Firstly, even if psychopaths are unable to *automatically* register morally relevant information based on certain cues (e.g. facial expressions), they might be able to register this information by *consciously attending* to these cues. Secondly, even if they cannot register morally relevant information from certain sources (e.g. facial expressions) they might gain this information from other sources. Jurjako and Malatesti suggest for example, that a psychopath staging an armed bank robbery might not be able to detect the bank clerk's fear from her facial expression, but could infer it from other signs, e.g. screaming, putting her hands in the air etc. (Jurjako and Malatesti 2018). To show that psychopaths' (supposed) deficits might not undermine their responsibility, they draw an analogy with a colourblind person who is responsible for jay-walking, despite his inability to see the red light, because he should have worked out other ways of telling whether the light was red, based on, e.g. the order of the lights and other people's behaviour. Only in unusual circumstances, such as the authorities unforeseeably altering the order of the lights, would the colourblind person be relieved of responsibility. Similarly, they argue, the psychopath would only be non-responsible in relatively unusual circumstances.

However, there are alternative interpretations of the data, which, if correct, would increase the likelihood that an individual with psychopathy was non-responsible for his or her act. If, as suggested above, the evidence indicates that (at least some) psychopaths do not automatically register and respond to others' morally relevant emotions, this might have undermined their *moral development* so that they failed to develop into moral agents in the first place. For example, Blair (2017) has argued that psychopathy is a developmental disorder that is often apparent from earliest childhood. As noted above, it has been frequently observed, that, unlike normally

developing children, children with psychopathic tendencies (or at least those children with the severe form of the disorder) seem unresponsive to the attempts of parents and teachers to socialise them, seem unable to form loving relationships with others, including primary care-givers, and seem, even as toddlers, capable of inflicting pain without the inhibition about doing this that is seen in non-psychopathic toddlers (see, e.g., Hare 1999, Kahn 2012). Blair (2017) describes a body of developmental research that supports the proposition that an automatic aversive response to perceiving another's distress is crucial part of moral development (see also references in Cushman et al 2017). When a normally-developing child perpetrates or witnesses care-based transgressions, which involve hurting someone else, the child will "learn the badness of the care-based transgressions because of the pairing of the victim's distress [which the child observing it finds aversive] with the commission (or observation of someone else committing) the care-based transgression" (Blair 2017). Care-givers also typically reinforce, in the mind of the child, the idea that such care-based transgressions are bad by pointing to the victim's distress (see, e.g. Nucci and Nucci 1982) and it seems plausible that a failure to form a bond of affection with the care-giver (or indeed with anyone) undermines these attempts at reinforcement.

Now, it might be objected that the kind of emotionally-informed moral understanding that some philosophers have argued is necessary for responsibility is much more complex than this basic association of an automatic aversion to others' distress with the "badness" of an act. However, in response, it is not being suggested that this basic emotional association is all that moral understanding consists in, but, rather, that it may be the (empirically) necessary foundation upon which sophisticated empathy and genuine moral understanding are built. Similarly, John Deigh (1995,743) argues that the kind of sophisticated empathy necessary for genuine moral understanding

emerges gradually “from early experiences of shared feeling... [Empathy takes] increasingly mature forms as one's understanding of what it is to be a human being and to live a human life deepens”.

If psychopathy is a disorder of moral development, as described, then adult psychopaths could not be held responsible on the basis that they *should* (i.e. were under a moral obligation to) have worked out what other people were feeling through non-automatic routes, because one needs to be a moral agent in the first place in order to recognise what one's moral obligations are. This point is brought out in the following passage from Kant.

“There are certain moral endowments such that anyone lacking them could have no duty to acquire them. They are moral feeling, conscience, love of one’s neighbour and respect for oneself (self esteem). There is no obligation to have these because they lie at the basis of morality. . . All of them are natural predispositions of the mind for being affected by concepts of duty. To have these predispositions cannot be considered a duty; rather, every...[moral agent] has them, and it is by virtue of them that he can be put under an obligation. . . For if [a person] really had no conscience, he could not even conceive of the duty to have one. . .” (Gregor tr. 1991, p 400)<sup>xiv</sup>

If the account of moral development outlined above is correct, then the “moral endowments” involved in the normal process of forming a conscience may include automatic emotional responses to others’ distress, experienced at a critical stage of early development. Evidence that (at least some) *adult* psychopaths have normal neurological responses to others’ distress, which are not engaged automatically, but which emerge under specific experimental conditions, does not show that the required responses were engaged at the relevant developmental stage. However, this

evidence, might suggest that psychopaths have the ability to *acquire* moral understanding, if they receive interventions that help to elicit the necessary emotional responses during moral learning. An analogy might be drawn with learning language. Someone might have the neurological architecture necessary to acquire language, under certain conditions, but they do not have the ability to speak, unless their ability to acquire language has been engaged under those conditions.

Even if reduced amygdala volume in psychopaths is evidence of the “use it or lose it” principle (Jurjako 2019), if psychopaths did not use the necessary brain regions, because they were not exposed in early childhood to the conditions in which those brain areas would be activated, they cannot fairly be blamed for the underdeveloped state of their brains and the impaired emotional capacities that may result.

### **Section 5: An Individualised Approach to Psychopathy**

There is a tendency among theorists to frame some of their arguments in terms of the legal and moral responsibility of "psychopaths" as a class or in terms of a subcategory of psychopaths (e.g. severe psychopaths, or unsuccessful psychopaths) as a class (see e.g. Jalava and Griffiths 2017, Glannon 2017, Glenn et al 2011, Duff 1977). This approach might seem odd from a medico-legal perspective, since mental incapacity defences generally require an individualized assessment of the accused's capacities at the time of crime. Simply showing that the accused belonged to class of people with a particular medical diagnosis, by itself, generally cannot settle the question of whether that individual was criminally responsible. Now, if the term "psychopath" were being used as a philosophical (rather than medical) concept, defined in terms of the complete lack of certain capacities that were argued to be pre-requisites for moral agency (see Duff 1977), it would make sense to talk of the non-responsibility of psychopaths in general. However, many theorists

use the term "psychopath" to refer to a medical diagnosis, such as "PCL-R psychopathy", and it is relatively unusual for it to be the case that *all* individuals with a particular medical diagnosis are *never* responsible. This could be the case for conditions such as severe intellectual disabilities, advanced dementia, or advanced Huntington's disease, but it is not true of many other conditions such as depression, bi-polar disorder, anxiety disorders, or schizophrenia, which can undermine the responsibility of *some* sufferers on *some* occasions.

Such considerations suggest that the criminal and moral responsibility of individual PCL-R psychopaths should be assessed on a case-by-case basis (Jalava and Griffiths 2017, Shaw 2016 & 2009). Indeed, even if one were employing the word "psychopathy" as a philosophical concept, defined in terms of the absence of certain pre-requisites for responsibility, it would still need to be established on a case-by-case basis that an individual wrongdoer met this definition of psychopathy. When arguing for an individualised approach, Jurjako and Malatesti (2018) helpfully distinguish between general capacities and specific capacities. A general capacity is an ability that an agent can exercise in a suitably wide range of contexts, but not necessarily in all circumstances; whereas a specific capacity is an ability that an agent can exercise on a particular occasion. For example, a person may have the general capacity to play the piano but might lack the specific capacity to do so in certain circumstances, e.g. when she is asleep, or has no access to a piano. They rightly maintain that, when considering whether a psychopath is morally/criminally responsible for committing a wrongful/criminal act, it is relevant to consider the psychopath's *specific* capacities to understand and act in accordance with moral/legal norms at the time of performing the act.

## **Conclusion**

This chapter drew attention to a question that has been paid insufficient attention in the legal philosophical literature on the criminal responsibility of psychopaths – who should bear the burden of proving that they are or are not responsible and to what standard? It provided some reasons for thinking that raising a reasonable doubt as to psychopaths’ capacity for moral understanding should be enough to justify exempting them from criminal responsibility and punishment. (Although it may still of course be necessary to hospitalise or treat them – if effective treatments can be developed - to prevent them from harming others – for discussion of this issue see Shaw 2018). This chapter summarised relevant research on psychopathy and discussed an interpretation of this research that was consistent with psychopaths being entitled to an excuse on sentimental grounds (having also argued that any doubt about sentimentalism should be dealt with in favour of the accused.) Finally, this chapter proposed that it should be decided on a case-by-case basis whether someone diagnosed with psychopathy should be excused from criminal responsibility.

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<sup>i</sup> For discussions of varieties of sentimentalism and rival theories see: Kauppinen (2014) and Gill (2007).

<sup>ii</sup> Although some theorists who endorse this conclusion base their arguments on psychopaths' (supposed) rational, rather than emotional incapacities.

<sup>iii</sup> *Woolmington v DPP* [1935] AC 462, 481

<sup>iv</sup> *McNaghten's Case* (1843) 10 Cl & F 210). Ramadan (2002, p247) provides a useful summary of variations between jurisdictions in terms of the nature of the burden placed on the accused.

<sup>v</sup> The Law Commission made this proposal in the context of arguing that the current insanity defence in England and Wales should be abolished and replaced by a "recognised medical condition" defence.

<sup>vi</sup> This capacity to respond to another's emotion with an appropriate emotion is sometimes called "affective empathy". In contrast, "cognitive empathy" (or "theory of mind") is the ability to work out what someone is feeling ("affective" theory of mind) or knows/believes ("cognitive" theory of mind). (For a useful diagram outlining the connections between these concepts see: Sebastian 2011, p814). These deficits may interact. Difficulties working out what someone is feeling could interfere with one's ability to respond with appropriate emotions. Similarly, if one feels nothing when witnessing another's emotion, one may attend less to others' emotions, interfering with the ability to recognise others' emotions. It is often claimed that psychopathy mainly impairs affective empathy (e.g. Blair 2008, Bollard 2013, Nelkin 2016), whereas certain other conditions, such as mild autism spectrum disorders, mainly affect cognitive empathy (Montgomery et al 2016 and see references listed in Baron-Cohen et al 2019). However, there is some evidence, discussed in section 5.1.3 of this chapter, suggesting that some psychopaths may suffer both from reduced affective empathy and (to some extent) reduced cognitive empathy (specifically reduced automatic affective theory of mind). It seems that individuals with mild autism spectrum disorder can have intact moral understanding and a strong moral code, despite problems with cognitive empathy, suggesting that reduced cognitive empathy per se is not an insuperable barrier to moral understanding, if affective empathy is intact. For further discussion of the relevance of different types of empathy impairment (seen in autism versus psychopathy) to the capacities required for responsibility (see, e.g. Kennett 2002, Bollard 2013, Nelkin 2016, Dineen 2019).

<sup>vii</sup> This capacity to feel concern for another is sometimes referred to as "sympathy" (Sebastian 2011). For the purposes of this chapter, unless otherwise indicated, "empathy" will refer to "affective empathy" (as defined in the previous footnote) together with "sympathy".

<sup>viii</sup> The point that emotional response to wrongdoing tends to diminish with spatial and temporal distance was considered by Hume, who maintained that sympathy was the source of moral judgements. He argued that reason tells us that that human suffering which occurs in a distant land is no less bad than suffering which is more immediate. By analogy, he argued, reason tells us that objects do not really diminish in size the further we move away from them. However, this does not show that reason alone could enable us to make moral judgements any more than reason alone without visual sensations could allow us to make judgements about the real and apparent sizes of the objects which we see (Hume, Seby-Bigge Ed. 1975). For another broadly Humean response to this kind of problem see: Radcliff (1994).

<sup>ix</sup> *McNaghten's Case* (1843) 10 Cl & F 200, per Lord Chief Justice Tindal at 210.

<sup>x</sup> Although Hare denies that this necessarily means that they should be exempt from legal responsibility.

<sup>xi</sup> Haji (1998) has suggested the opposite – arguing that it is easier to justify holding psychopaths legally rather

than morally responsible. Furthermore, the requirements for some conceptions of moral responsibility might be more demanding than others (e.g. the "basic desert" sense of moral responsibility versus the "moral

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appraisability” sense see Pereboom 2006).

<sup>xii</sup> *Woolmington v DPP* [1935] AC 462, 481.

<sup>xiii</sup> Earlier in the article, Jurjako and Malatesti make the more modest claim that the current evidence does not warrant the conclusions that "psychopaths lack moral understanding" or that they "should be excused from criminal responsibility". In other words, at this earlier point in their article, they merely make the negative claim that those who argue for the non-responsibility of psychopaths have not (yet) proved their case (2018, p1013).

<sup>xiv</sup> I Kant (Gregor tr. 1991). This passage is also cited in Fine and Kennett (2004). This passage in Kant may appear to contradict Kant's seemingly cognitivist position discussed in the previous section. For a discussion that can shed light on how to interpret these conflicting strands in Kant's moral theory see: M Midgley, 'The Objection to Systematic Humbug' (1978) 53 (204) *Philosophy* 147.